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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX

Appellants

vs.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL**

Appellees

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**MOTION TO DISMISS
FOR LACK OF CERTIORARI JURISDICTION**

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Attorneys for Appellee

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Appellee, Employers Liability Assurance Corporation, Ltd., pursuant to Rule 7 (3), Paragraph 3, of the Revised Rules of the Supreme Court of the United States, respectfully moves that the order entered herein on May 3, 1954, granting the petition for writ of certiorari, be vacated and that the writ of certiorari be dismissed for the following reasons:

1. Judgment was entered in the above entitled cause by the Court of Appeals for the Fifth Circuit on

February 27, 1953. U.S.C. Title 28, Sec. 1254 (1) provides that the Supreme Court of the United States may review cases in the courts of appeals "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." It appears that no petition for certiorari has been filed in this cause by any party hereto and that this Court lacks certiorari jurisdiction.

2. A petition for appeal and attached appeal papers were filed by appellants in this Court on March 31, 1953, and jurisdiction of this Court was invoked under U.S.C. Title 28, Sec. 1254 (2).⁽¹⁾ That statute provides that an appeal from a court of appeals decision "*shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the federal questions presented.*"⁽²⁾

3. Appellants, at the end of their Jurisdictional Statement under a heading entitled "Alternate Certiorari Application", state that they "*are also applying for certiorari with respect to the same judgment.*"⁽³⁾ However, no separate petition for certiorari to review the judgment of the court of appeals has ever been filed in this cause by appellants or any party hereto.

1. See Jurisdictional Statement filed by appellants.

2. U.S.C. Title 28, Sec. 1254 (2).

3. The last paragraph of appellant's Jurisdictional Statement, entitled "Alternate Certiorari Application", follows verbatim the language used in a form in West's Federal Forms, Vol. 1, Sec. 203, at page 200. However, note the comment of Harold B. Willey immediately following said form at page 200. (Footnote 4(b) *infra*.)

4. The mere assertion by appellants, at the end of their Jurisdictional Statement, that they "*are also applying for certiorari*" does not constitute a petition for certiorari nor comply with the provisions of Rule 38 of this Court.

5. Appellants, in the "Alternate Certiorari Application" hereinabove referred to, rely upon *Bradford Electric Light Company v. Clapper*, 284 U.S. 221, 52 S. Ct. 118, 76 L. Ed. 254. That decision merely holds that if the appeal from a court of appeals decision is dismissed as improvident, the Court is still free to consider a timely application for certiorari on its own merits. In the same case, in the decision on the merits, this Court said: "The company filed in this Court *both* an appeal and a petition for writ of certiorari. The appeal was denied, and certiorari granted." (*Bradford Electric Light Company v. Clapper*, 286 U.S. 145, 151, 52 S. Ct. 571, 76 L. Ed. 1026, 1031). In sharp contrast, appellants in the present case filed only appeal papers and no separate timely application for certiorari has ever been filed.

6. It appears that this Court has no authority to treat the appeal papers filed by appellants as a petition for certiorari to the Court of Appeals for the Fifth Cir-

entit.⁽⁴⁾ The absence of such authority is clearly expressed in U.S.C. Title 28, Sec. 1254 (2). In sharp contrast are the express provisions of U.S.C. Title 28, Sec. 2103⁽⁵⁾ requiring this Court to treat the papers whereon an improvident appeal is taken from a decision of *the highest court of a state* as a petition for certiorari.

7. More than ninety (90) days have expired since the entry of judgment in this case by the Court of Appeals for the Fifth Circuit, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court. (U.S.C. Title 28, Sec. 2101 (c) and Rule 38 of this Court).

4. (a) Stern & Gressman, Supreme Court Practice, page 18: "If an appeal under Sec. 1254 (2) is found to have been improvidently taken, **the Supreme Court has no authority to treat the appeal papers as a petition for certiorari to the court of appeals.** The absence of such authority is in sharp contrast to the express provision of 28 U.S.C. Sec. 2103."
- (b) West's Federal Forms, Vol. 1, page 200 (Comment by Harold B. Willey): "If an appeal is taken from a judgment of a Court of Appeals where the proper method of review is by petition for writ of certiorari **the court has no jurisdiction to treat the appeal papers as a petition for writ of certiorari** as is the case when an appeal is mistakenly taken from a judgment of a state court, but it can entertain a **separate** petition for a writ of certiorari provided the latter is timely filed."
- (c) Simkin's Federal Practice, 3rd Ed., Sec. 943, page 674: "**The (appeal) papers cannot be treated as a petition for certiorari,** as in the case where appeals are improvidently taken from state court judgment."
- (d) Moore's Commentary on the U.S. Judicial Code, Sec. 0.03(53), page 553: "There is, however, no provision in Sec. 1254 which authorizes an improvident but timely appeal from the court of appeals to be treated as a petition for certiorari, as Sec. 2103 authorizes in case of an appeal from a state court."
5. U.S.C. Title 28, Sec. 2103 provides in part as follows: "If an appeal to the Supreme Court is improvidently taken from the decision of the **highest court of a State** in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but **the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.**"

8. This motion is not based upon grounds already advanced in opposition to the granting of the writ of certiorari. No notice of the filing of a petition for certiorari, together with a copy of said petition, printed record or supporting brief was ever served upon appellee or its counsel. In fact, it appears that no petition for certiorari was ever filed by appellants in any way complying with the provisions of Rule 38 of this Court. Accordingly, appellee has had no previous opportunity or reason to file a brief in opposition to the granting of the writ of certiorari.

THEREFORE, it appears that this Court lacks certiorari jurisdiction; no timely petition for a writ of certiorari was filed by appellants. The order entered herein on May 3, 1954, granting the petition for writ of certiorari, should be vacated and the writ of certiorari should be dismissed.

Respectfully submitted,

Charles D. Egan

Benjamin C. King

Attorneys for Appellee,
Employers Liability
Assurance Corporation, Ltd.

Dated this _____ day of June, 1954.